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In the Supreme Court of the United States

OCTOBER TERM, 1982

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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TABLE OF AUTHORITIES

Page

Cases:

FPC v. *Union Electric Co.*, 381 U.S. 90 4

Puget Sound Power & Light Co. v. *FERC*, 644 F.2d 785, cert. denied, 454 U.S. 1053 4

Rochester Gas & Electric Corp., 344 F.2d 594 ... 4

United States v. *Nevada*, 412 U.S. 534 3

Statute:

Federal Power Act, Section 3(8), 16 U.S.C. 796(8) 1, 2, 4

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Petitioner contends that the court of appeals erred in holding that the Truckee River is not a "navigable water of the United States," within the meaning of Section 3(8) of the Federal Power Act, 16 U.S.C. 796(8).

1. The Truckee River originates at Lake Tahoe, California, and flows into Nevada, where it empties into Pyramid Lake, which is located within the Pyramid Lake Indian Reservation. Respondent Sierra Pacific Power Company owns and operates four small hydroelectric plants on the river. In July 1975, the Pyramid Lake Paiute Tribe petitioned the Commission to exercise its regulatory jurisdiction with respect to Sierra's operation of its power plants and to require Sierra to terminate its operation of those facilities in the absence of a license. The Tribe claimed that the upstream diversion of water from the Truckee for the four Sierra plants was detrimental to its Pyramid Lake fisheries (Pet. App. 2-5 & n.1).

On the basis of evidence adduced at a hearing before an administrative law judge, the Commission found that the Truckee River is a navigable water of the United States within the meaning of Section 3(8) of the Federal Power Act[1] and that Sierra's power plants are subject to the Commission's licensing jurisdiction (Pet. App. 29-93). The Commission based its finding on evidence that the Truckee had in the past been used to float logs from forests near Lake Tahoe to saw mills situated along the river in California near the point at which the river crosses the state line from California into Nevada, and on additional evidence that the Truckee was also used to float logs from a point in Nevada somewhat downstream of the state line to Reno (*id.* at 44-64). The Commission noted that there was less evidence of actual use of the river at the state line itself, but reasoned that the state line reach was nonetheless navigable within the meaning of the statute, because that section of the river either was suitable for navigation or was an "interruption" between navigable sections of the river (*id.* at 67-71). The Commission observed further that Congress had approved a number of flood control improvements involving the Truckee and its tributaries, and that for this

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[1]Section 3(8) of the Act defines "navigable waters" to mean

> those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

additional reason the Truckee was a navigable water of the United States under the statute (*id.* at 74-80). Accordingly, the commission ordered Sierra to seek a license for its hydroelectric plants on the river (*id.* at 91).

2. The court of appeals reversed and remanded (Pet. App. 1-14; 681 F.2d 1134). The court held that there was no substantial evidence to support the Commission's findings that the Truckee is navigable or is suitable for navigation at the state line reach (Pet. App. 10). In addition the court expressed the view that the state line reach of the river does not constitute an "interruption" under the statute because "the river itself does not form a 'continuous highway' for commerce between the states" (*id.* at 12). Disagreeing with the Commission regarding the type of improvement to a waterway that will suffice to bring that waterway within the Commission's jurisdiction, the court held that such improvements must be for navigational purposes (*id.* at 13).

3. a. We agree with petitioner that the court of appeals incorrectly ruled that the Truckee River is not a navigable water under the Federal Power Act. The Truckee clearly is an interstate waterway and is connected to Lake Tahoe, which itself is a navigable interstate waterway. It is undisputed that the Truckee was once used to move goods in interstate commerce. Indeed, in *United States* v. *Nevada*, 412 U.S. 534, 535 (1973), this Court stated, albeit in a different context, that the Truckee River is "a navigable interstate stream." In requiring evidence of movement of commerce across the state line in order to bring the Truckee within the statutory definition of navigable waters, the court's decision appears to conflict with other decisions under the Federal Power Act finding navigability on the

basis of intrastate movement of goods. See, *e.g.*, *Puget Sound Power & Light Co.* v. *FERC*, 644 F.2d 785 (9th Cir.), cert. denied, 454 U.S. 1053 (1981); *Rochester Gas & Electric Corp.* v. *FPC*, 344 F.2d 594 (2d Cir. 1965).[2]

b. Although we believe that this case was incorrectly decided, we do not believe that it warrants review by this Court. The decision of the court of appeals rests on rather unique facts.[3] It is not likely to have any significant impact on the Commission's jurisdiction in other cases. Indeed, the holding below does not preclude the Commission from asserting jurisdiction over the dams in suit on a different basis.[4]

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[2]Moreover, this Court has noted that Congress delegated to the Commission the full scope of its authority to regulate use of the nation's water resources in those instances in which the Commission's hydroelectric licensing jurisdiction attaches. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 98 (1965). Consistent with this comprehensive authority, we submit that, once Congress has exercised its jurisdiction to improve a waterway—even for flood control purposes—the Commission may regulate hydroelectric developments on that waterway.

[3]The Commission is aware of no other case in which a finding of non-navigability under Section 3(8) of the Federal Power Act was based on the non-navigability of the waterway at the state line reach.

[4]In its opinion in this case, the Commission noted (Pet. App. 81 n.71) that the record did not establish whether the dams and reservoirs operated by Sierra were on public lands. If such were the case, it would afford another basis for the Commission's assertion of jurisdiction for the purpose of requiring a license under the Federal Power Act. Moreover, under the court of appeals' remand order, the Commission is free to consider alternative grounds for asserting jurisdiction over the projects in question.

In the circumstances, we are unable to represent that the case warrants review by this Court.

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